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Written Submission of Peter Neufeld
Co-Director, Innocence Project
Montana House Judiciary Committee
Re: SB 236 – An Act Abolishing the Death Penalty
March 23, 2009

Good afternoon to Chairman and Committee Members. My name is Peter Neufeld and I am Co-Founder and Co-Director of the Innocence Project. I appreciate the opportunity to submit a written statement to be included in the record for your consideration.

The Innocence Project assists persons in proving their innocence through post-conviction DNA testing. To date there have been 234 men and women exonerated by post-conviction DNA testing nationwide. The Innocence Project has, in the vast majority of these cases, either represented or assisted in the representation of these innocents. Of particular relevance to this Committee's consideration, seventeen of the people proven innocent by DNA evidence had been sentenced to death.

Every time an innocent is convicted the person who really committed the crime escapes justice and may commit other crimes. The Innocence Project works on reforms that go to the root causes of wrongful convictions – unreliable forensic science, mistaken identification, false confessions, law enforcement misconduct, and ineffective defense counsel. Our policy agenda is a pro-law enforcement agenda, win-win reforms that protect the innocent and help identify the guilty. It is precisely because of the dual nature of our work – both the efforts to exonerate the innocent and the constructive efforts to strengthen the capacity of the criminal justice system to make more accurate guilt/innocence determinations – that we may be able to provide a somewhat unique and hopefully helpful perspective on the complicated risk/benefit question you are addressing today.

In the most serious crimes, criminalists believe that more than 85% do not involve biological evidence susceptible to DNA testing, perhaps our best tool for producing highly reliable - but certainly not infallible - evidence of guilt or innocence.[1] Most homicide cases turn on eyewitness testimony, confessions, the credibility of witnesses, or circumstantial evidence, not DNA testing. Therefore DNA testing is not a panacea that

[1] This figure is based upon frequent representations from our nation's leading criminologists. Barry A. J. Fisher, past-president of the American Academy of Forensic Sciences, past-president of the International Association of Forensic Sciences, past-president of the American Society of Crime Laboratory Directors and a past-chairman of the American Society of Crime Laboratory Directors – Laboratory Accreditation Board, recently testified before the California Commission on the Fair Administration of Justice and stated that DNA testing constitutes approximately five percent of the work of crime labs. Michael M. Baden, M.D., director of the Medicological Investigations Unit of the New York State Police, in testimony before the U.S. Senate Committee on the Judiciary indicated that "in less than 10% of murders, the criminal leaves DNA evidence behind." James Christy, director of the Future Explorations Unit of the Department of Defense's Cyber Crime Unit was quoted as saying that "only about 1% of criminal cases introduce DNA evidence."

can prevent wrongful executions. Although DNA has helped us to shed light on the existence of wrongful convictions across the nation, it simply does not have the capacity to ensure either a fair or accurate application of this irreversible sentence.

Having worked in this field for thirty years, perhaps the most significant lesson I have learned is that in matters of crime and justice, humility is important because even the most experienced among us are often wrong. My partner, Barry Scheck, and I have reviewed hundreds of cases. In some cases, after I have pored over reams of court transcripts, scrutinized piles of police reports, dissected crime lab analyses, sifted through evidence and property logs, and studied scores of witness statements, I have strongly suspected some men's guilt, only later to discover I was wrong. No less often, someone I strongly suspect is innocent turns out to be guilty. Indeed, because every one of us is human and all of us are actors in a fact-finding mission, if just one of us makes an error, jumps to a conclusion, or acts on a false assumption, an innocent man can be condemned to a guilty man's fate.

A. The Risk of Executing An Innocent

1. What Can Be Learned From DNA Exonerations

Post-conviction DNA testing has demonstrated that the risk of convicting an innocent is much greater than even the most cynical expected, and it naturally follows that the risk of executing an innocent is greater than previously believed. No one can responsibly or sensibly quantify the risk of executing an innocent; there are simply too many sources of error that occur at unknowable rates at every stage of the criminal process to make that kind of judgment.

DNA testing has, on the other hand, provided some very sobering data about the frequency of error in different parts of the system that are very compelling in trying to assess, with necessarily incomplete information, the fallibility of the system as a whole:

** **FBI Exclusion Data.** The National Institute of Justice has performed the only known survey of DNA exclusions of defendants in criminal cases. In that study the FBI reported that since it began conducting such DNA testing in 1989, it found that in at least 24% of the cases where it gets results – ordinarily matters where a suspect has been arrested or indicted based on non-DNA evidence – the defendant was excluded.[2] This robust finding is also conservative because if four suspects in a case are excluded for purposes of this statistic the FBI will count it as just one "primary" suspect being excluded. Surveys by the National Institute of Justice corroborate that private laboratories, as well as state and local laboratories, report similar exclusion rates, or even higher exclusion rates.

[2] Department of Justice, Office of Justice Programs, National Institute of Justice, NCJ 161258, "Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial", p. 20, June 1996.

** **Pre-Conviction/Post Indictment Exclusions**. Although unfortunately no one is keeping systematic track of the data, law enforcement officials across the country acknowledge that in thousands of cases, including many homicides, arrests and indictments based on seemingly compelling proof like a detailed confession or multiple eyewitnesses, have been vacated and the real assailant identified before conviction based upon DNA testing.

** **Governor Warner's Virginia Experiment.** In 2001, the Innocence Project asked officials in Virginia to search the state's archives for a former lab analyst's old notebooks, since DNA testing on vaginal swabs she had remarkably stapled into her notebook had led to the exoneration of one of our clients, Marvin Anderson. Officials subsequently discovered notebooks with biological evidence from over 330 old cases, most of them collected before DNA testing was available. Two more people were exonerated after DNA testing on samples from the notebooks. Recognizing that this evidence could shed light on the propriety of the convictions in those cases, Virginia Governor Warner declared that, "A look back at these retained case files is the only morally acceptable course," and agreed to test all of them. He started out, however, with a small random sample of these convicted felons. Out of the first 29 of these randomly selected cases, there were two exonerations (and in one case the real assailant was identified), which is close to a 7% exoneration rate. ["Follow the DNA to find the truth," The Roanoke Times, 12/16/05.]

Some Case Histories of DNA Exonerations: False Guilty Pleas to Capital Offenses

There are seventeen cases where innocent men were sentenced to death and subsequently exonerated by DNA testing. The cases are all documented on our website, www.innocenceproject.org. Kirk Bloodsworth, a former United States Marine, was the first man in the Unites States whose capital conviction was overturned by postconviction DNA testing. Kirk was convicted based on the mistaken identification of five eyewitnesses of having raped and murdered a little girl in Baltimore County, Maryland. Even after DNA testing forced a prosecutor to vacate his conviction and dismiss the case against him, the prosecutor still wouldn't concede Mr. Bloodsworth was innocent. It wasn't until, after years of prodding the prosecutor to do so, a DNA profile from semen found in the girl's underwear was run in the CODIS system and came up with a "hit" to the real assailant who, astonishingly, had actually shared a jail cell with Mr. Bloodsworth. For those of you who haven't, I urge you to read his wonderful book, written with Tim Junkin, entitled *Bloodsworth,* to get a true sense of how an innocent, a Marine with no criminal record, could come so close to execution.

Similarly, in 2006, John Grisham came out with his first non-fiction book about the case of Ron Williamson, one of our clients who came within five days of execution in Oklahoma.[3] That case is also chronicled in *Actual Innocence*,[4] a book Jim Dwyer, Barry

[3] John Grisham, *The Innocent* (New York: Doubleday, 2006).
[4] Barry Scheck, Peter Neufeld, and Jim Dwyer, *Actual Innocence* (New York: Doubleday, 2000).

Scheck and I wrote about DNA exoneration cases and the lessons that can be learned from them.

Each of the seventeen DNA exonerations of men sentenced to death is a chilling reminder of how the innocent can be executed, as are the nearly fifty homicide cases where innocents were convicted, but not sentenced to death before DNA exonerated them. Many of these men -- Eddie Joe Lloyd in Detroit, Michigan; John Restivo, John Kogut, and Dennis Halstead in Nassau County, New York -- I know very well and feel certain they would have been sentenced to death and possibly executed if Michigan or New York had capital punishment when they were convicted.

But I would like to bring to your attention some case histories not generally known, but that are very instructive about the risk of error generated peculiarly by capital punishment and the extreme difficulty of ever finding out about such grievous errors: the false guilty plea, false confession cases. The very fact that someone might plead guilty and/or give a false confession in a capital case to avoid execution might seem unlikely or preposterous to some, but DNA testing shows this does happen, and one must assume that in cases where DNA testing is not available, or would not be probative, discovering a false confession would be close to impossible.

- **Anthony Gray**, who was convicted in Prince George's County, Maryland, was sentenced to two concurrent life sentences after pleading guilty to rape and murder charges in order to avoid the death penalty. Police officers had coaxed a confession out of Gray, who is borderline retarded, by telling him that two other men arrested in connection with the case had told police that Gray was involved.

  Some years later, the conviction came under intense scrutiny when a man arrested in connection with a burglary reported unpublicized details about the rape and murder for which Mr. Gray had been convicted. DNA testing of semen recovered from the crime scene excluded Mr. Gray and the other two men originally arrested for the crime and produced a match to the burglary suspect, who eventually pled guilty to the crime for which Mr. Gray had been imprisoned for seven years.

- **David Vasquez** was arrested for the murder of a woman in Arlington, Virginia, who had been sexually assaulted and then hung. Vasquez, who is mentally impaired, confessed to the crime and provided details that were not released to the public. Mr. Vasquez could not provide an alibi and was placed near the scene of the crime by two eyewitnesses. Additionally, investigators found two pubic hairs at the crime scene that resembled those of Vasquez.

  Faced with what appeared to be a collection of evidence that pointed to his guilt, Mr. Vasquez entered a guilty plea. DNA testing later proved that the murder was committed by another man, Timothy Spencer. Prosecutors joined with defense attorneys to secure the eventual pardon of Mr. Vasquez.

- **Christopher Ochoa** pled guilty to the rape and murder of an Austin, Texas woman. He confessed to the crime and implicated another man, Richard Danziger. The state offered to give him a life sentence if he agreed to plead guilty and testify against Danziger at trial. Under threat of receiving the death penalty and by the advice of his attorney, Ochoa agreed to their terms.

  At trial, however, Mr. Ochoa changed his story and claimed that he, and not Mr. Danziger, had shot the victim. Consequently, prosecutors charged Mr. Danziger with rape instead of the murder. Mr. Danziger could not provide a reason as to why Mr. Ochoa, his friend, might have testified against him.

  Both men received life sentences and years later, the police, then-Governor Bush's office, and the District Attorney's Office received letters from a man named Achim Marino, claiming that he was solely responsible for the crime for which Ochoa and Danziger had been convicted. His letter told investigators precisely where to locate items that were stolen from the scene of the crime, which police were able to obtain.

  Thirteen years after the commission of the crime, Ochoa and Danziger were exonerated and released from prison. Ochoa, who recently graduated law school, now states that his confession and implication of Danziger were the results of police pressure and fear of the death penalty.

- **Jerry Frank Townsend**, a mentally retarded man in Florida, was convicted of six murders and one rape and sentenced to seven concurrent life sentences. This began when, in 1979, Townsend was arrested for raping a pregnant woman in Miami, Florida. During the investigation, he confessed to other murders. The confessions were largely the consequence of Townsend wanting to please authority figures, a common adaptive practice by someone with his mental capacities.

  Eventually, Townsend was cleared by DNA evidence following actions in 1998, when a victim's mother asked a Ft. Lauderdale police detective to review the Townsend cases. In 2000, DNA testing of preserved evidence implicated another man, Eddie Lee Mosley, and also cleared Townsend for two of the six murders. This cast substantial doubt on the accuracy of all of Townsend's confessions. In April 2001, further DNA testing cleared Townsend of two additional killings to which he had previously confessed, and ultimately, two months later, he was cleared of all charges and released from prison – after having served twenty-two years for crimes he did not commit.

Each of these cases demonstrate an unfortunate ripple effect caused by the presence of the death penalty. Because each of the men featured in the aforementioned case studies feared being sentenced to death, they pled guilty to crimes they did not commit in order to secure a lesser sentence. Some have expressed concern that repealing the death penalty will weaken the ability of prosecutors to get life without parole pleas.

Whatever the merits of that argument, it must be acknowledged that fear of the death penalty has often resulted in innocents falsely pleading guilty to life without parole.

2. What Can Be Learned From Non-DNA Cases

Wrongful convictions and executions have happened and will continue to happen. This occurrence is not an urban myth or a fantasy drummed up by any particular advocacy group. It has long been believed that our court systems could rely on forensic science for the certainty it seeks when considering putting the accused to death. As the case example below shows such reliance when considering executing a defendant can be tragically misplaced.

Cameron Willingham of Corsicana, Texas was executed in February 2004 for murder by arson. Later that year, an investigation proved and newspaper accounts published new scientific evidence that it was impossible to determine arson after all. A panel comprised of national arson experts concurred in March 2006 that the science underlying Willingham's conviction was invalid. The panel also looked at the case of Ernest Willis, another Texan, who was convicted of murder by arson and concluded that in his case as well, the science was unsupportable. Although Willis and Willingham were on death row in Texas at the same time, Willis was exonerated – and later compensated by the state – when his conviction was undermined and only through a retrial could he have remained on death row. There is no evidence demonstrating that the facts in the Willingham case, however, were ever revisited until now. Just last year, the Texas Forensic Science Commission announced its intention to investigate possible professional negligence or misconduct connected to the arson analysis in the Willingham case.

I raise the Cameron Todd Willingham case not because I believe that Montanans should wrestle with a possible wrongful execution in Texas, but because it is exemplary of an instance where science that was largely thought to be sound was later determined to be unsound. Who is to say that in 20 or 30 years there won't be further advances that reveal our current methods to be based on false assumptions? Science never stops advancing, and there is always the potential for another breakthrough to raise new questions about old methods. Simply because we are only now beginning to understand the scope of issues affecting the quality of forensic results does not mean that we can be assured that the risk of executing a wrongfully convicted person is now minimized.

B. The Causes of Wrongful Conviction

1. Fundamental Flaws in the Criminal Justice System

Each of the aforementioned cases is instructive because they reveal not only how easily mistakes can happen, but also how many miscarriages of justice cannot be proven in the absence of a definitive test like DNA. Indeed, only a narrow percentage of criminal cases involve biological evidence that can be subjected to DNA testing, and in

many instances that evidence has been contaminated, degraded, lost or destroyed when a case is revisited years later in the postconviction context.

The nation's 234 DNA exonerations have taught us that any number of factors – sometimes many functioning at once – can yield a wrongful conviction and that the appeals process does not provide the needed protections to detect them. The public benefit of DNA exonerations, however, lies in their opportunity to understand how the criminal justice system – from eyewitness to police to prosecutor to judge to jury to appellate courts to the Supreme Court – can find a person guilty beyond a reasonable doubt when the accused is simply innocent.

The Innocence Project has examined these 234 wrongful convictions proven through DNA testing, and identified those factors that confound the criminal justice system, sometimes at the earliest stages. These include, but are not limited to: mistaken eyewitness identifications; faulty forensic work – predicated on improper crime scene collection, contamination, drylabbing, falsified results, the use of unvalidated assays, and statistical exaggerations about their rigor; false or coerced confessions; reliance on jailhouse informants; poor defense; and prosecutorial misconduct.

2. Notorious Montana Cases Demonstrating the Fallibility of Forensic Evidence

Montanan Jimmy Ray Bromgard was convicted of rape in 1987. Montana Department of Justice Crime Lab Director Arnold Melnikoff's testimony played a crucial role in sending Mr. Bromgard to prison when he was just 19 years old. Mr. Bromgard was initially arrested after police believed he resembled the composite sketch of the man who broke into a Billings home and raped a young girl. The case hinged on her ambivalent identification and Mr. Melnikoff's forensic hair analysis.

Mr. Melnikoff testified that head and pubic hairs found on the victim's bed sheets matched Mr. Bromgard's hair samples. He testified that there is a one in 100 chance of a head hair matching an individual, and a one in 100 chance of a pubic hair matching an individual— and that "it's a multiplying effect," so there was a one in 10,000 chance that the hairs belonged to anyone else. "[I]t's the same as two dice," he testified. "If you throw one dice with a one, one chance out of six; if you throw another dice with a one, it's a one chance out of six, you multiply the odds together." This damning testimony was also fraudulent: there has never been a standard by which to statistically match hairs through microscopic inspection. Mr. Melnikoff simply took the impressive numbers out of thin air. DNA testing exonerated Mr. Bromgard in 2002, two years after the Innocence Project took his case and over 14 years after his wrongful conviction.

This was not the last time Mr. Melnikoff testified falsely at the trial of a Montana man later proven innocent through DNA testing. In May 2003, Paul D. Kordonowy was exonerated of a 1987 rape conviction after DNA testing proved his innocence. He had

been sentenced to 30 years in September 1989, for aggravated burglary and sexual intercourse without consent and served 13 years.

Forensic testing had been performed on head and pubic hairs by Mr. Melnikoff, who testified that he could distinguish head and pubic hairs from one Caucasian to another in 99 out of 100 cases. He then testified that the head and pubic hairs from Mr. Kordonowy could not be distinguished from the suspect hairs recovered from the investigation, and that the chances of multiple hairs from another person's hair being consistent with the multiple crime scene hairs was 1 in 10,000. Again, this testimony was improper because there is not adequate empirical data on the frequency of various class characteristics in human hair to characterize whether consistency is a rare or common event.

Blood group testing was also performed in the case. The results were said to include Kordonowy despite the presence of an enzyme in the semen sample that could not have come from Kordonowy. The analyst testified incorrectly that sugars produced by bacteria could have caused the foreign enzyme.

At the Innocence Project's request, a peer review committee of the nation's top hair examiners reviewed Mr. Melnikoff's forensic testimony in the Bromgard case. They concluded in their report that Mr. Melnikoff's statistical evidence was completely unfounded and urged Montana's Attorney General to set up an independent investigation of his work in other cases. At the prosecution's request, the FBI hair analysis unit re-examined the hairs and also concluded that they didn't belong to Mr. Bromgard. Even then, the Montana Attorney General refused to order an investigation; instead, he conducted his own internal review which determined that there was no reason to investigate the evidence in Mr. Melnikoff's other cases. It was later revealed that the Attorney General, in his previous position as a county prosecutor, had used Mr. Melnikoff as an expert witness in numerous cases.

To this day there hasn't been an independent investigation of Mr. Melnikoff's work or the Billings crime lab where he served as director. Mr. Melnikoff's faulty statistical estimation was also previously used in the 1983 wrongful conviction of Chester Bauer, which was also later overturned through DNA testing. Mr. Melnikoff no longer works at the lab, but systems he set up may remain in place—unexamined and unfixed.

3. Questions About the Validity of Forensic Assays Continue to Emerge

Like the faulty hair evidence used to secure wrongful convictions in Montana, the validity of other forensic assays has been called into question. In 2002, the National Research Council (NRC) of the National Academy of Science (NAS) was asked by the FBI to examine the scientific basis of comparative bullet lead analysis (CBLA). Following the publication of NRC's report, the FBI voluntarily discontinued the use of CBLA pending the results of a 14-month review of the technique in light of the

recommendations put forth in the NRC's report. In 2005, the FBI announced a permanent discontinuation of CBLA.[5]

Since that time, the Innocence Network, an affiliation of organizations dedicated to providing pro bono legal and investigative services to individuals seeking to prove innocence of crimes for which they have been convicted, along with the National Association of Criminal Defense Lawyers, formed a joint task force to prevent the future use of misleading testimony that is based upon CBLA. A joint investigative report by the Washington Post and CBS News' "60 Minutes" has also since revealed that thousands of convictions across the country could have been predicated upon faulty FBI testimony that assumed the validity of the now discredited CBLA assay.[6] The FBI has now agreed to identify cases in which CBLA was used at trial so that a comprehensive review of court transcripts can determine which ones warrant reexamination.

CBLA represents only the tip of the iceberg. Just last month, the National Academy of Sciences released a groundbreaking report that addresses ongoing issues facing forensic science nationwide. The report says the nation's forensic science system lacks rigorous certification programs for forensic scientists, strong standards and protocols for analyzing and reporting on forensic evidence, solid research establishing the scientific bases and reliability of many forensic methods, and resources and oversight for crime labs. The National Academy of Sciences calls these serious deficiencies that require an overhaul of the nation's forensic science system. The report calls on the federal government to create a National Institute of Forensic Science to strengthen the oversight, research and support of forensic science. The safeguards recommended in the report, none of which have yet to be implemented, would improve public safety and prevent wrongful convictions by allowing forensics to play a more reliable role in identifying perpetrators of crime and protecting the wrongly accused.

C. Status of Montana Reforms Aimed at Solving Crime and Curbing the Risk of Executing An Innocent

In numerous areas, Montana has not taken even the most basic steps to ensure the innocent are not wrongfully convicted or executed. There are a number of measures that Montana could but have not taken to more proactively solve crimes and curb – but not entirely eliminate – the risk of convicting or executing innocents. Much more should be done in Montana to assure the fair administration of justice, including:

- **Oversight Authority of Montana's Crime Laboratories:** Regardless of the relative weight one believes should be given to evidence of forensic error or misconduct in their assessment of a particular case, there is no question that

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[5] See http://www.fbi.gov/pressrel/pressrel07/bulletlead111707.htm.

[6] See http://www.washingtonpost.com/wp-srv/nation/specials/silent-injustice/index.html?day=2 and http://www.cbsnews.com/stories/2007/11/16/60minutes/main3512453.shtml.

Montana has a disturbing history of failing to ensure the integrity of forensic evidence.

- **Proper Preservation of Biological Evidence**: Modern DNA technology, coupled with today's comprehensive information and communications technology, has exponentially increased the power of preserved evidence. Unfortunately, though, evidence preservation policies in Montana have proven insufficient to keep up with technology's promise. There is no uniformity in practice across law enforcement agencies charged with evidence retention, and the current law[7] only requires evidence preservation for three years after a conviction becomes final. This is woefully inadequate. The lion's share of post-conviction DNA exonerations are proven many years after conviction.

- **Eyewitness Identification Reform**: Misidentifications have contributed to the wrongful conviction of 75% of the 234 people exonerated through post-conviction DNA testing in the United States. Two of the three DNA exonerations in Montana were plagued by mistaken eyewitness identifications. Despite solid and growing proof of the inaccuracy of traditional eyewitness identification procedures – and the availability of simple measures to reform them - Montana has done nothing to mandate changes to its existing practices to enhance the reliability of those identifications used at trial.

- **The Electronic Recording of Custodial Interrogations in All Jurisdictions**: False "confessions" are a nationwide problem. Of the nation's 234 innocent people exonerated with DNA evidence, nearly 25% of the underlying wrongful convictions involved false confessions or admissions. While we are aware of a dozen law enforcement agencies that have elected to electronically record custodial interrogations in Montana, including the police departments of Billings, Bozeman, Missoula and Helena, there is no uniform statewide policy requiring its universal implementation.

- **Regulate Incentivized Testimony:** The use of jailhouse informants and other incentivized witnesses is a demonstrated cause of wrongful conviction. A groundbreaking report that focused upon the "snitch system" and published by the Center on Wrongful Convictions in 2004, found that incentivized witnesses were the leading cause of wrongful convictions in U.S. capital cases. A recent comprehensive study of the nation's first 200 exonerations proven through DNA testing concluded that 18% were convicted, at least in part, on the basis of informant, jailhouse informant or cooperating alleged co-perpetrator testimony. Montana, however, has not implemented any reforms aimed at regulating the use of incentivized informants.

- **Increased Resources for Indigent Defense, Prosecution & the Courts**: The United States and Montana constitutions assure the provision of counsel for those

[7] See MCA 46-21-111.

accused of crimes, regardless of the ability to pay.[8] Despite these constitutional protections, indigent defense remains sorely underfunded across the nation. Because capital cases are such an extraordinary drain on defender resources, given the stakes involved, the presence of a death penalty can force the diversion of resources away from many of the other important, non-capital cases that offices handle. Defender agencies are not the only entities struggling with resources. Prosecutorial agencies must also juggle resources in order to prepare for capital cases. And recent op-ed from the Independent Record, authored by a former state court administrator, indicates that from a court operations perspective, Montana simply cannot afford to administer the death penalty: "The reality is that the death penalty pumps millions of dollars of very scarce public resources into a handful of executions and then buries those costs in a thicket of legal proceedings that never appear as line items in any budget."[9] Rather than continue to administer a capital punishment system that no one can comfortably assert is either affordable or immune to error, Montana should establish a commission charged with identifying the current resource shortfalls for defense and prosecutorial agencies, as well as the courts.

D. The Impact of DNA Evidence in Assuring the Fairness and Accuracy of Capital Cases

Finally, I will address the impact of DNA on ensuring fairness and accuracy in capital cases. When it comes to fairness, DNA has no impact on ensuring the death penalty is administered fairly and uniformly. If, for instance, you seek to reduce arbitrariness in the death penalty across racial and geographic lines, DNA cannot help you.

With respect to accuracy, some have proposed the notion that if the death penalty was restricted to only cases where DNA could prove guilt, the risk of executing an innocent person would be eliminated. This is simply untrue. Montana has experienced its share of difficulties relating to ensuring the integrity of forensic results at trial, which, on its face should demonstrate the potential fallibilities of forensic evidence. This troubled history aside, we have come to learn that it is the precision of DNA databases that underpins the reliability of DNA evidence. Specifically, questions are being raised – even in very recent headlines – about the probability of a match between a DNA profile, or partial profile, derived from crime scene evidence entered in CODIS (the FBI's national DNA database) and a convicted offender's profile.

A DNA profile is considered complete when it identifies genetic characteristics at various locations, or markers, on the human genome. When a DNA profile derived from crime scene evidence fails to match the DNA profile of a particular individual, even at one marker, this is considered an 'exclusion.' Exclusions are absolute. Therefore, at the Innocence Project, we are always certain of a petitioner's innocence when a match

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[8] *Gideon v. Wainwright,* 372 U.S. 335 (1963)

[9] Oppendahl, J. "Montana Can't Afford the Death Penalty." (2009, Feb. 2) Independent Record.

between his profile and the crime scene evidence cannot be made. On the other hand, inclusions – when a DNA profile derived from crime scene evidence matches the DNA profile of a particular individual – are subject to greater interpretation.

A death penalty based upon DNA evidence would actually *increase* the arbitrariness of the death penalty system, as the capital punishment system would be reserved for those who left DNA behind at the crime scene, and not necessarily the "worst of the worst." Is the murder of one person involving a struggle really more death-worthy than someone who shoots ten people from a distance and thus leaves no DNA behind?

Conclusion

Public opinion remains ambiguous about the question of whether capital punishment ought to be an available sentencing option, but support for the death penalty, regardless of country or region, is greatest when no other sentencing options are presented to respondents.[10] The same is true for Montana.[11] Reasonable people, however, can differ as to whether the death penalty is a morally appropriate punishment for the most heinous of murders committed by the worst of the worst offenders.

I also assume that reasonable people agree – and this is a moral question – that since "death is different," an irreversible punishment, all necessary resources must be provided to ensure that every aspect of the capital punishment system – investigation, defense, prosecution, trial, appeal, and post-conviction – is as fair and accurate a result as possible.

As the nation's wrongful convictions have revealed, errors can occur at every turn, and it is only DNA testing – when properly performed – that can topple a house of cards built upon just one imperfect element. Since DNA exists in relatively so few cases, an individual's life can hinge on a sloppy report, an inadvertent cue, or the work of an overburdened practitioner. And even though its reach is limited with respect to its ability to shed light on every case, DNA has helped us to expose a range of systemic problems, including:

- Juries deliberating with incorrect information;
- Public and private defenders providing ineffective assistance of counsel;
- Crime lab mishandling and contamination of evidence; the falsification of results; the misrepresentation of forensic findings on the stand; and the provision of statistical exaggerations about the results of testing;
- Witnesses misidentifying innocent people as the actual perpetrators;
- Innocent people confessing to crimes that they did not commit;

[10] Zimring, Franklin E. The Contradictions of American Capital Punishment. New York: Oxford University Press, 2003.
[11] Montana poll regarding the death penalty, conducted by The Mellman Group. (February, 2009).

- Innocent people pleading to crimes they did not commit, particularly when they fear the administration of the death penalty; and
- Unreliable informants acting on the basis of real or perceived incentives.

If steps are taken to address these problems, that will also help to reduce wrongful convictions. But note that I say "reduce" wrongful convictions – because when human beings are involved, you can never completely eliminate them. Can we state with certainty that Montana's criminal justice system, as currently operated, will always uncover actual innocence in capital cases? Given the range of potential error, even an excellent judicial case review process simply cannot fairly be expected to, without fail, identify every miscarriage of justice.

It is precisely these error-prone areas that require and deserve attention, as well as the dedication of resources. Rather than focusing limited resources on the administration of the death penalty, we should shift our attention and resources to the prevention of wrongful conviction and the implementation of policies that will help us to solve more crimes. In doing so, we will meet the dual goal of making our streets safer and enhancing public confidence in the criminal justice system.

With a current death row population of two individuals, Montana's death penalty system appears, in large part, a symbolic exercise, yet the risk of executing an innocent – particularly in light of proven wrongful convictions associated with heinous crimes – still exists. We have to ask ourselves how much risk is acceptable when a life is at stake and an execution cannot be reversed, particularly when other aspects of the criminal justice system deserving our attention remain unaddressed.

Montana must recognize and reform the various systemic weaknesses that can cause wrongful convictions – and therefore, wrongful executions. It is only after having implemented those reforms, assessed their effectiveness, and soberly recognized the remaining threat of wrongful conviction presented by systemic and human error, that Montana can fairly assess whether a capital punishment system should persist. At this time, however, the risk of executing an innocent person is too great, and therefore unacceptable.

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